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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

9 DEMOS WHITLEY,

No. C 19-5459 WHA (PR)

10 Petitioner,

**ORDER GRANTING MOTION TO  
DISMISS**

11 v.

12 R. NEUSCHMID, Warden,

(Dkt. No. 13)

13 Respondent.  
14 \_\_\_\_\_/

15 **INTRODUCTION**

16 Petitioner, a California prisoner, filed this pro se petition for a writ of habeas corpus  
17 pursuant to 28 U.S.C. § 2254 challenging the criminal judgment of a state court. Respondent  
18 filed a motion to dismiss the petition. Petitioner did not oppose the motion. For the reasons  
19 discussed below, the motion to dismiss is **GRANTED** and the case is **DISMISSED**.

20 **STATEMENT**

21 The parties do not dispute the following. In 2006, a jury in Alameda County Superior  
22 Court convicted petitioner of two counts of second-degree robbery. Petitioner had seven prior  
23 “strike” convictions, and the trial court sentenced him to a term of 65 years to life in state  
24 prison. In April 2007, the California Court of Appeal affirmed the conviction, and on July 11,  
25 2007, the California Supreme Court denied a petition for review.

26 Between August and November 2018, petitioner filed several unsuccessful petitions in  
27 the California Court of Appeal. In December 2018, he filed a habeas petition in Alameda  
28 County Superior Court, which denied the petition as untimely in January 2019. On April 4,  
2019, petitioner filed a habeas petition in the California Supreme Court, and the court the

1 denied the petition as untimely on July 10, 2019. Petitioner filed the instant federal petition in  
2 August 2019.

### 3 ANALYSIS

4 Prisoners must file petitions challenging non-capital state convictions or sentences  
5 within one year of the latest of the date on which: (A) the judgment became final after the  
6 conclusion of direct review or the time passed for seeking direct review; (B) an impediment to  
7 filing an application created by unconstitutional state action was removed, if such action  
8 prevented petitioner from filing; (C) the constitutional right asserted was recognized by the  
9 Supreme Court, if the right was newly recognized by the Supreme Court and made retroactive  
10 to cases on collateral review; or (D) the factual predicate of the claim could have been  
11 discovered through the exercise of due diligence. 28 U.S.C. § 2244(d)(1). Time during which a  
12 properly filed application for state post-conviction or other collateral review is pending is  
13 excluded from the one-year time limit. 28 U.S.C. § 2244(d)(2).

14 Petitioner's judgment became final under Section 2244(d)(1)(A) on October 11, 2007,  
15 because that is when the time for seeking a writ of certiorari in the United States Supreme Court  
16 from the denial of his final direct appeal in the state court expired. *See Bowen v. Roe*, 188 F.3d  
17 1157, 1158 (9th Cir. 1999). The limitations period expired one year later, on October 11, 2008.  
18 Under the "mailbox rule" the instant petition is deemed filed when it was given to prison  
19 authorities for filing. *See Houston v. Lack*, 487 U.S. 266, 276 (1988). Petitioner filed the  
20 instant petition more than ten years later, in August 2019. Absent tolling for that amount of  
21 time, the instant petition is untimely.

22 Time during which a properly filed application for state post-conviction or other  
23 collateral review is pending is excluded from the one-year time limit. 28 U.S.C. § 2244(d)(2).  
24 Petitioner's state habeas petitions do not toll the limitations period because he filed them in  
25 2018, long after the limitations period had already expired. *See Ferguson v. Palmateer*, 321  
26 F.3d 820, 823 (9th Cir. 2003) (holding that once AEDPA's limitations period has run, state  
27 habeas petition cannot revive it). Accordingly, tolling under Section 2244(d)(2) does not render  
28 the instant petition timely. In addition, petitioner does not assert that there are grounds to

1 equitably toll the limitations period, nor do any such grounds appear in the record. Petitioner  
2 argues that the petition is timely because the trial court lacked jurisdiction over his conviction.  
3 He contends that jurisdiction was lacking because the state charged him with a felony  
4 complaint. The federal constitution does not require a prosecutor to charge a defendant  
5 with a grand jury, nor does it forbid the use of a felony complaint as a charging  
6 document. *Hurtado v. California*, 100 U.S. 516, 534-35 (1984). Petitioner presents no  
7 authority that he had a constitutional right to a grand jury, much less that the use of a felony  
8 complaint deprived the state court of jurisdiction over his criminal trial or rendered the instant  
9 petition timely.

### 10 CONCLUSION

11 For the foregoing reasons, respondent's motion to dismiss the petition as untimely is  
12 **GRANTED** and the petition is **DISMISSED**.

13 Rule 11(a) of the Rules Governing Section 2254 Cases now requires a district court to  
14 rule on whether a petitioner is entitled to a certificate of appealability in the same order in  
15 which the petition is denied. Petitioner has failed to make a substantial showing that a  
16 reasonable jurist would find the dismissal of his petition debatable or wrong. *Slack v.*  
17 *McDaniel*, 529 U.S. 473, 484 (2000). Consequently, no certificate of appealability is warranted  
18 in this case.

19 The clerk shall enter judgment and close the file.

20 **IT IS SO ORDERED.**

21 Dated: August 26, 2020.

22   
23 WILLIAM ALSUP  
24 UNITED STATES DISTRICT JUDGE  
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